

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID No. 0712029663
)	
STEVEN KOKOTAYLO,)	
)	
Defendant.)	

Submitted: March 25, 2011
Decided: June 30, 2011

On Defendant's Motion for Postconviction Relief - DENIED

MEMORANDUM OPINION

Renee L. Hrivnak, Department of Justice, 820 North French Street, Wilmington, Delaware 19801.

Steven Kokotaylo, Howard Young Correctional, Wilmington, Delaware, 19801.
Pro se.

CARPENTER, J.

On this 30th day of June, 2011, upon consideration of the Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Steven Kokotaylo (the "Defendant") has filed a pro se Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61").

For the reasons set forth below, the Motion will be DENIED.

2. Defendant was indicted on February 4, 2008 on the following charges: (1) Attempted Rape 1st Degree, (2) Terroristic Threatening, (3) Unlawful Imprisonment 2nd Degree, (4) Harassment, and (5) Offensive Touching. On March 31, 2008, the Defendant entered a *Robinson* plea to Attempted Rape 4th degree and Terroristic Threatening.¹ Following the completion of a pre-sentence investigation, this Court sentenced the Defendant to 5 years of incarceration followed by 2 years of Level 3 probation. On January 24, 2011, more than two years after the judgment of conviction was final, the Defendant filed this Motion for Postconviction Relief. The Defendant asserts the following grounds for relief: (1) counsel failed to "inquire" into the statement the victim gave to the police (2) counsel failed to review police reports, (3) counsel failed to obtain the 911 tape and failed to pursue a bail reduction, and (4) counsel failed to properly explain the

¹ A *Robinson* plea was allowed by the Court since the Defendant had no recollection of the events of the evening due to his impaired condition.

plea agreement to him and that he felt coerced and threatened to accept the State's plea agreement.

3. Before the Court can consider the merits of the Defendant's claim for postconviction relief, it must ensure that the Defendant's claim satisfies the procedural requirements set forth in Rule 61(i).² Under Rule 61(i), a motion must be filed within one year of the final judgment of conviction to be valid.³ Additionally, the motion will be barred if any ground for relief was not raised in a prior postconviction motion; the defendant failed to assert the claim in the proceedings leading to the defendant's conviction, unless the defendant can show cause and prejudice for the failure to raise such claims; or the grounds for relief were formerly adjudicated in any proceeding leading to the conviction, unless the interest of justice requires reconsideration.⁴ The procedural bars to relief under Rule 61(i)(1),(2), and (3) are inapplicable "to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."⁵

² *State v. Mundy*, 2001 WL 789666, *1 (Del. Super. Apr. 12, 2001).

³ Super. Ct. Crim. R. 61(i)(1).

⁴ Super. Ct. Crim. R. 61(i)(2)-(4).

⁵ Super. Ct. Crim. R. 61(i)(5).

The “fundamental fairness” exception stated in Rule 61(i)(5) is narrow and has only been applied in limited circumstances.

4. The Defendant entered a guilty plea on March 31, 2008 and did not appeal his conviction. This Motion for Postconviction Relief was filed on January 24, 2011, more than two years after his conviction became final. The Defendant appears to raise a claim of ineffective assistance of counsel, which, if meritorious, could permit the Defendant to evade the time bar under rule 61(i)(1) as a matter of fundamental fairness.⁶ Thus, even though the time bar would normally operate to bar consideration of the Defendant’s claims, the Court will address the merits of the Defendant’s ineffective assistance claim out of an abundance of caution.

5. Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland v. Washington*.⁷ A defendant’s claim of ineffective assistance of counsel is subject to a strong presumption that the representation was professionally reasonable.⁸ To overcome the presumption, the defendant must establish (1) that his trial counsel’s efforts fell below a reasonable objective standard, and (2) that there is a reasonable probability that the outcome of the

⁶ See, e.g., *Felton v. State*, 945 A.2d 594, 2008 WL 308231, at *1 (Del. Feb. 1, 2008) (holding that the defendant’s ineffectiveness claims are without merit and do not serve to overcome the time and procedural bars).

⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See also *Winn v. State*, 705 A.2d 245 (Del. 1998).

⁸ *Winn v. State*, 705 A.2d 245, 1998 WL 15002, at *2 (Del. Jan. 7, 1998) (citing *Albury v. State*, 551 A.2d 53, 59 (Del. 1988)).

proceedings would have been different but for counsel's unprofessional errors.⁹

The defendant must substantiate concrete allegations of actual prejudice or risk summary dismissal.¹⁰ The Court must "evaluate the [defense counsel's] conduct from counsel's perspective at the time," free from the "distorting effects of hindsight."¹¹

6. The Defendant first claims that counsel did not inquire into the statement the victim gave the New Castle County Police. It is not clear from the Defendant's motion what the Defendant believes his counsel did or failed to do that amounts to a professionally unreasonable representation as required by *Strickland*. Furthermore, if the Defendant is suggesting that his counsel failed to inquire into the victim's statement, the Defendant's counsel has provided this Court with a sworn affidavit stating that staff of the public defender's office interviewed the victim several times.¹² Accordingly, the Defendant cannot sustain a claim of ineffective assistance of counsel on this ground.

7. Next, the Defendant asserts that counsel failed to obtain and review the police reports related to this incident. The Defendant has provided no evidence to support his claim that his counsel did not review the police reports

⁹ *Strickland*, 466 U.S. at 689.

¹⁰ *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

¹¹ *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).

¹² Aff. at 2.

before he entered his guilty plea, and his assertion contradicts the record in this case. The Defendant's counsel affirmed in her affidavit that she reviewed the police reports which were provided to her by the State and sent those records to the Defendant on or about February 29, 2008.¹³ Without more, the Defendant cannot overcome the presumption of a professionally reasonable representation.

8. Third, the Defendant states that counsel failed to obtain the emergency 911 call from the victim and that his attorney did not pursue any bail reduction. The Defendant's attorney admits both of these allegations. However, her admission does not relieve the Defendant of his burden to prove that his counsel's representation was unreasonable or that he suffered actual prejudice as a result.¹⁴ Both of these allegations of ineffective assistance are conclusory, and in the context of a guilty plea, a showing of ineffective assistance of counsel requires the defendant to show actual prejudice by establishing that the defendant would not have pleaded guilty and would have insisted on going to trial absent counsel's unprofessional errors.¹⁵ Here, the Defendant has made no such showing. The Defendant has not asserted that he would have elected to go to trial instead of entering a guilty plea if his counsel had obtained the 911 transcripts and there is nothing to suggest the tape would have affected in any way the conduct of the

¹³ Aff. at 2.

¹⁴ Cf. *Mundy*, 2001 WL 789666 at *4.

¹⁵ *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (quoting *Albury v. State*, 551 A.2d 53, 60 (Del. 1988)).

trial. Furthermore, whether the Defendant was incarcerated or out on bail would have changed nothing in how the case was managed. Accordingly, the Defendant cannot support a claim of ineffective assistance of counsel on these grounds.

9. Finally, the Defendant claims that his counsel did not properly explain his guilty plea to him and that he felt coerced into accepting the first plea agreement that was offered to him. However, the record in this case does not support the Defendant's allegations. There are several procedures in place to ensure that a defendant's guilty plea is both knowing and voluntary. The trial judge addresses the defendant in open court to ensure that the defendant understands (1) the nature of the charges against him or her; (2) that a guilty plea operates as a waiver of trial on those charges and as a waiver of the constitutional rights the defendant would be entitled to exercise at trial; and (3) that the defendant was not induced to enter a guilty plea as a result of force, threats, or promises separate from the plea agreement.¹⁶ This was done in this case. Further, a defendant is bound by his or her answers on the Truth-in-Sentencing Guilty Plea Form and by his or her answers in the guilty plea colloquy unless the defendant can present clear and convincing evidence of some deficiency in the Court's inquiry.¹⁷ The record in this case reflects that the Defendant's counsel reviewed

¹⁶ *Somerville*, 703 A.2d at 631-32.

¹⁷ *Id.* at 632.

the plea agreement and the Truth-In-Sentencing Guilty Plea Form before the Defendant entered his guilty plea. On the Truth-In-Sentencing Guilty Plea Form, the Defendant affirmed that he had “freely and voluntarily decided to plead guilty to the charges listed in [his] written plea agreement.” The Defendant also affirmed both on the form and during the Court’s colloquy that he had not been promised anything not stated in his written plea agreement and that no one had threatened or forced him to enter his plea. Finally, the Defendant acknowledged that he was satisfied with his lawyer’s representation. On the basis of the record before the Court, the Defendant cannot show that his guilty plea was defective.

Having found that all of the Defendant’s claims for relief are without merit, the Defendant’s Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.